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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

NEOFONIE GMBH, a German  
corporation,

Plaintiff,

vs.

ARTISSIMO DESIGNS LLC, a  
Delaware limited liability company,

Defendant.

Case No.: 8:17-cv-00772 CJC  
(JDEx)

STATUS UPDATE REGARDING  
ARTISSIMO'S INABILITY TO  
COMPLY WITH COURT-  
ORDERED MEDIATION

ARTISSIMO DESIGNS LLC,

Counter-Plaintiff.

vs.

NEOFONIE GMBH

Counter-Defendant.

1 In an Order entered on Monday, September 16, 2019, the Court  
2 vacated the existing pretrial conference and trial dates and “order[ed] the  
3 parties to participate in a settlement conference within 30 days of this  
4 Order.” (Doc. No. 77.) Under Rule 6(a) of the Federal Rules of Civil  
5 Procedure, the deadline for compliance with this Order would be  
6 Wednesday, October 16, 2019.

7 Unfortunately, since that time, Plaintiff/Counter-Defendant Neofonie  
8 GMBH (“Neofonie”) has consistently refused to attend the Court-ordered  
9 mediation in person, as required by Local Rule 16-15.5(b). And as  
10 explained further below, Neofonie’s counsel has also ignored Artissimo’s  
11 offer to meet and confer regarding the motion Neofonie would be required  
12 to file to obtain relief from the in-person requirement. Artissimo believes  
13 Neofonie’s personal appearance is necessary in this matter not only  
14 because the Local Rules require it, but also because the previous mediation  
15 that Neofonie attended telephonically (over Artissimo’s objection) failed to  
16 produce settlement.

17 Artissimo has explained its position to Neofonie’s counsel and  
18 repeatedly requested Neofonie’s cooperation. Nevertheless, it appears that,  
19 based on Neofonie’s stated position, Artissimo will be unable to comply  
20 with the Court’s Order. Artissimo asks that the Court enter whatever  
21 orders it deems necessary to resolve this conflict so that the parties may  
22 have productive settlement negotiations.

### 23 **Relevant Factual Background**

24 Artissimo’s counsel first reached out to Neofonie’s counsel about  
25 scheduling mediation the day after the Court’s Order was entered. (See  
26 Decl. of Peter C. Sales, attached hereto as Exhibit 1, at ¶ 3; Sept.-Oct. 2019  
27 email chain between Peter C. Sales and Sacha Emanuel, attached hereto as  
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1 Exhibit 2.) At that time, Artissimo’s counsel made its position as to  
2 personal attendance clear, suggested a mediator, offered to split mediation  
3 costs 50/50, and asked for Neofonie’s available dates. (Ex. 2.) In a second  
4 email that same day, Artissimo’s counsel provided a date when the  
5 proposed mediator was available. (*Id.*) The next day, Artissimo’s counsel  
6 notified Neofonie’s counsel of a change in the proposed mediator’s  
7 availability, offered to consider any alternative mediators, and again asked  
8 for Neofonie’s available dates. (*Id.*) Having received no response,  
9 Artissimo’s counsel sent additional emails on September 20 and September  
10 24, 2019. (*Id.*)

11 Finally, on September 25, 2019—more than a week after the Court’s  
12 Order and Artissimo’s initial email—counsel for Neofonie, explaining that  
13 he was “very busy,” provided “some dates on which [Neofonie] is  
14 available.” (*Id.*) He added: “The judge did not order my client to be  
15 available in person and, as you know, my client is based in Germany.”  
16 (*Id.*) Counsel’s email made no mention of the Local Rule’s requirement  
17 for in-person attendance or any intention to seek leave for his client to  
18 appear remotely. A second email followed ten minutes later, wherein  
19 Neofonie’s counsel revealed that he had not, and refused to, even ask his  
20 client to attend the mediation in person. (Ex. 1 at ¶ 4.)<sup>1</sup>

21 Within four hours, Artissimo’s counsel responded explaining, in  
22 relevant part:

23 [C]onsidering that the last mediation was unsuccessful  
24 and your client merely participated via video (over Artissimo’s  
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26 <sup>1</sup> Because that email contains several references to substantive discussions  
27 in the prior mediation, Artissimo has not included it with this filing. (*Id.*)  
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1 objection), I do not believe that your email and your refusal to  
2 even ask your client to attend an in-person mediation in Los  
3 Angeles (where your client filed this matter) is productive. In  
4 my experience, the success of a telephonic or video mediation  
5 is rare, at best.

6 It is clear that Judge Carney intends to provide the parties  
7 every opportunity to resolve this matter without a trial.  
8 Accordingly, your refusal to even ask your client to attend an  
9 in-person mediation seems to be counterproductive to Judge  
10 Carney's efforts. Moreover, L.R.16-15.5(b) requires that the  
11 mediation be in-person. Accordingly, to the extent you refuse  
12 to reconsider your position or your client refuses to attend the  
13 in-person mediation, Neofonie must file a motion with Judge  
14 Carney seeking leave.

15 (Ex. 2.) In response, on September 26, 2019, Neofonie's counsel  
16 demanded that Artissimo make a settlement offer before mediation and  
17 continued to refuse to ask his client to attend mediation in person. (Ex. 1 at  
18 ¶ 5.)

19 On September 27, 2019, Neofonie suggested an alternative mediator.  
20 (*Id.* at ¶ 6; Sept. 2019 email chain between Peter C. Sales and Sacha  
21 Emanuel, attached hereto as Exhibit 3.) Artissimo's counsel responded to  
22 this email the same day, thanking Neofonie for the suggestion, and then  
23 reiterated: "However, you still must provide dates that you and your client  
24 are available for an in-person mediation in Los Angeles. Alternatively,  
25 please provide a date and time for a meet and confer regarding your motion  
26 seeking leave of Court for relief of the requirement of an in-person  
27 mediation as stated in L.R. 16-15-5(b)." (Ex. 2.) Also on September 27,  
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1 2019, Artissimo's counsel contacted the suggested mediator's office,  
2 determined he had no availability until April 2020, and provided an  
3 alternative list of mediators. (Ex. 3.)

4 Neofonie's counsel responded on September 30, 2019, stating he  
5 would consider these mediators and making alternative suggestions for a  
6 settlement conference. (*Id.*) That same day, Artissimo's counsel thanked  
7 Neofonie's counsel for the consideration of those mediators and agreed to  
8 consider his alternative proposals. (Ex. 2.) However, Artissimo's counsel  
9 reiterated that "you must still provide a date that you and your client are  
10 available to be in Los Angeles for an in-person mediation, as is required by  
11 the Local Rules." (*Id.*) Artissimo's counsel also explained: "We are  
12 quickly approaching Judge Carney's deadline. If you continue to refuse, I  
13 will be left with no alternative but to notify the court of your refusal." (*Id.*)  
14 Artissimo's counsel reiterated this request on October 1, 2019. (*Id.*)

15 On October 2, 2019, Neofonie's counsel suggested a half-day  
16 mediation on October 9, 2019. (Ex. 1 at ¶ 7.) Artissimo's counsel  
17 responded: "if you believe a half day would be sufficient, we are willing to  
18 entertain that (I need to confer with my client) but you must guarantee that  
19 you client will attend in-person as is required by the local rules." (Ex. 2.)

20 On October 3, 2019, Neofonie's counsel mentioned that he believed  
21 the parties needed more time for the mediation. (Ex. 1 at ¶ 8.) Artissimo's  
22 counsel reiterated its concerns about Neofonie's refusal to attend the  
23 mediation in person or meet and confer as to a motion for Neofonie to be  
24 excused from the personal attendance requirement. (Ex. 2.) Artissimo's  
25 counsel explained: "any possible constraints now placed on the parties as to  
26 the completion of the mediation has been caused by your refusal to comply  
27 with the requirements for an in-person mediation as provided in Local Rule  
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1 L.R. 16-15-5(b). In fact, you explicitly refused even to consult with your  
2 client regarding available dates for an in-person mediation.” (*Id.*)

3 Neofonie’s counsel made other suggestions as to potential mediators  
4 on October 4 and 10, 2019, but he did not commit to Neofonie’s personal  
5 attendance (or to even asking his client to personally attend). (Ex. 1 at ¶ 9.)  
6 Consequently, on October 4, 8, and 11, 2019, Artissimo’s counsel  
7 reiterated Artissimo’s position that, absent approval to be excused, Local  
8 Rules required in-person attendance for the mediation. (Ex. 2.) On  
9 October 11, 2019, Artissimo added that it “intend[ed] to file a Status  
10 Update with the Court regarding the parties’ compliance with the Court’s  
11 Order requiring mediation on Monday [October 14]” if Neofonie’s position  
12 remained unchanged. (*Id.*)

13 On October 14, 2019, Neofonie’s counsel requested that, if  
14 Artissimo believed a status report was necessary, it delay filing the status  
15 report so that it could be a joint report. (Ex. 1 at ¶ 10; redacted<sup>2</sup> October  
16 14, 2019 email between Peter Sales and Sacha Emanuel, attached hereto as  
17 Exhibit 4.) Artissimo agreed to wait until 5:00 pm Central time on October  
18 15, 2019, to file and asked Neofonie to provide its position for insertion  
19 into the report by 4:00 p.m. Central time. (Ex. 4.) As of this filing (which  
20 occurred after 5:00 p.m. Central time), Artissimo’s counsel has not  
21 received anything from Neofonie’s counsel to include in this filing. (Ex. 1  
22 at ¶ 10.)

23 In the same October 14, 2019 email, Neofonie’s counsel again took  
24 the position that the Order did not require in-person mediation and, for the  
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26 <sup>2</sup> This email has been redacted to omit references to the substance of the  
27 settlement discussions at the prior mediation.  
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1 first time, explained that he did not believe Local Rule 16-15.5(b) required  
 2 his client to attend in person. (Ex. 4.) Neofonie pointed to the language of  
 3 the rule allowing “parties residing outside the District” to appear  
 4 telephonically, “at the discretion of the settlement officer.” (*Id.*) For the  
 5 first time, Neofonie’s counsel explained that he believed that, under this  
 6 Rule, the parties should choose the mediator and then let the mediator  
 7 decide whether a telephonic appearance is permitted. (*Id.*)

### 8 **Relevant Factual Background**

9 Since the Order was issued, Artissimo has diligently pursued  
 10 mediation. However, Neofonie has refused to commit to personal  
 11 attendance at the mediation or to meet and confer about the motion that  
 12 would be needed to excuse it from this requirement. Only yesterday has  
 13 Neofonie indicated any legal basis for its refusal: its belief that it should  
 14 ask the mediator instead of the Court. As explained below, personal  
 15 attendance is required by both the Local Rules and the practicalities of this  
 16 matter, and in this case, this is a matter for the Court.

17 First, contrary to Neofonie’s arguments, Local Rules generally  
 18 require in-person mediation:

19 ***Each party shall appear*** at the settlement proceeding in person  
 20 or by a representative with final authority to settle the case . . . .

21 A corporation or other non-governmental entity satisfies this  
 22 attendance requirement if represented by a person who has final  
 23 settlement authority and who is knowledgeable about the facts  
 24 of the case. . . ***At the discretion of the settlement officer, and***  
 25 ***only with the settlement officer’s express authorization,***  
 26 parties residing outside the District may have a representative  
 27  
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1 with final settlement authority available by telephone during the  
2 entire proceeding, in lieu of personal appearance.

3 L.R. 16-15.5(b) (emphasis added). The Rule provides an exception where  
4 appropriate. However, the language of the Rule is quite clear that personal  
5 attendance is the general rule. Express authorization is required if a party  
6 wishes to have that requirement waived.

7 Artissimo has repeatedly suggested to Neofonie that, if it wishes to  
8 appear telephonically, it should ask the Court for permission. Although  
9 Artissimo would oppose that request on the merits for the practical reasons  
10 stated below, it has offered to meet and confer with Neofonie so as to move  
11 the process forward. Neofonie has ignored that request.

12 Yesterday, Neofonie—which had never previously challenged  
13 Artissimo’s reading of the Local Rule—argued for the first time that the  
14 mediator should determine this issue rather than the Court. Respectfully, a  
15 mediator will not have the full picture of this case. The Court, on the other  
16 hand, clearly recognized that a mediation in this particular case would be  
17 valuable when it ordered the parties to undertake mediation again. As the  
18 mediation order came from the Court, it is most appropriate to have the  
19 Court determine whether the plaintiff should be required to attend  
20 mediation in person.

21 Ultimately, Neofonie should be required to attend the mediation in  
22 person in Los Angeles. Neofonie is the plaintiff in this matter and chose to  
23 file litigation in this forum. In the more than two years that this matter has  
24 been pending, Neofonie has been required to come to Los Angeles only  
25 once, for a Rule 30(b)(6) deposition. (Ex. 1 at ¶ 11.) Neofonie was  
26 previously granted a remote appearance over Artissimo’s objection, and  
27 settlement negotiations were not effective. Practitioners widely recognize  
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1 that personal attendance is more effective in generating a successful  
2 mediation. *E.g.*, § 24:21. Generally, 1 Alt. Disp. Resol. § 24:21 (4th ed.)  
3 (“For mediation to be effective, the parties must attend all mediation  
4 sessions in person, with full settlement authority.”)

5 It is not unreasonable to require a plaintiff, who is appearing in the  
6 forum voluntarily, to come to the forum for a final attempt at settlement  
7 before trial. Although the cost of a flight from Germany is no doubt  
8 substantial, it is far less than the cost of trial. Nor is this a situation where  
9 the in-person attendance requirement burdens only one party; Artissimo’s  
10 counsel is out-of-state and, while the expense is surely less than that from  
11 Germany, this is still an expense that Artissimo is required to bear.

12 For all of these reasons, Artissimo has resisted Neofonie’s efforts to  
13 avoid in-person attendance (or perhaps more accurately, its counsel’s  
14 efforts to avoid even asking his client to attend in person) without first  
15 obtaining the Court’s permission. Artissimo respectfully requests that the  
16 Court enter whatever orders it deems appropriate in this matter to resolve  
17 this conflict.

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20 Dated: October 15, 2019  
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Respectfully submitted,

BY: /s/ Peter C. Sales

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**CERTIFICATE OF SERVICE**

I, Kimberly M. Ingram, do hereby certify that on this 15<sup>th</sup> day of October, 2019, a true and correct copy of the foregoing document is being forwarded to the individual listed below in the manner indicated:

**Via CM/ECF System**

Sacha V. Emanuel, Esquire  
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/s/ Kimberly M. Ingram  
Kimberly M. Ingram, Esq.